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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT JONES,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court clarify a significant conflict of law regarding whether an improperly terminated employee is entitled to back pay until such time as the employee is subsequently properly terminated?

Parties in the Proceeding Below

Court of Appeals of Maryland,
Petition Docket No. 85, September Term 1995,

Court of Special Appeals of Maryland,
No. 941, September Term 1995

Robert Jones,

Plaintiff - Appellant

v.

Baltimore City Police Department,

and

Edward v. Woods, Commissioner

Defendants - Appellees

None of the parties is a private business entity either publicly traded or privately held.

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No.

In the

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October Term, 1995

Robert Jones,

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On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, dated February 15, 1995, captioned as Baltimore City Police Department, et al. v. Robert Jones appears as No.

941 (Md. Ct. Spec. App. 1994).

The Order of the Court of Appeals of Maryland in Jones v. Baltimore City Police Department, dated August 21, 1995, denying Jones' Petition for a writ of certiorari to the Court of Special Appeals of Maryland, appears as Petition Docket No. 85 (Md. 1995).

JURISDICTIONAL STATEMENT

The final Order of the Court of Appeals of Maryland of which review is sought was entered on August 21, 1995. Review is sought pursuant to Supreme Court Rule 13 and 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS

Md. Ann. Code, Art. 27 §641(a):

> Probation after plea or finding of guilt; terms and conditions; waiver of right to appeal from

judgment of guilt. -- (1)(i) 1. Whenever a person accused of a crime pleads guilty or nolo contendere or is found guilty of an offense, a court exercising criminal jurisdiction, if satisfied that the best interests of the person and the welfare of the people of the State would be served thereby, and with t'e written consent of the person after determination of guilt or acceptance of a nolo contendere plea, may stay the entering of a judgment, defer further proceedings, and place the person on probation subject to reasonable terms and conditions as appropriate. The terms and conditions may include ordering the person to pay a fine, pecuniary penalty, or restitution the person is entitled to notice and a hearing to determine the amount of the fine, pecuniary penalty, or restitution, what payment will be required, and how payment will be made. The terms and conditions also may include any type of rehabilitation program or clinic, or similar program, or the parks program or voluntary hospital program.

Md. Ann. Code, Art. 27 §730(c):

Hearings for convicted felon. -- A law enforcement officer is not entitled to a hearing under this section if the law enforcement officer has been charged and convicted of a felony.

Md. Ann. Code, Art. 27 §734A:

* * *

(2)(i) Emergency suspension with pay may be imposed by the chief when it appears that the action is in the best interest of the public and the law enforcement agency.

(ii) If the officer is suspended with pay, the chief may suspend the police powers of the officer and reassign the officer to restricted duties pending a determination by a court of competent jurisdiction with respect to any criminal violation or final determination by an administrative hearing board as to any departmental violation.

(iii) Any person so suspended shall be entitled to a prompt hearing.

(3)(i) Emergency suspension of police powers without pay be imposed by the chief if a law enforcement officer has been charged with commission of a felony.

(ii) Any person suspended shall be entitled to a prompt hearing.

Code of Public Local Laws of Maryland, §16-10(e)(2):

All appointments of police officers to the Department shall, during the first year of service following completion of entrance level training, be known and regarded as probationary. If, at

any time during the probationary period, the services of such appointees are not certified by the police physician as physically qualified to continue to discharge their duties, such person's employment may, in the discretion of the Commissioner, at any time within a one-year period, be forthwith terminated without the necessity for a hearing, and when so terminated such appointee shall cease to be a member of the Department.

STATEMENT OF THE CASE

On January 12, 1990, Officer Robert Jones was charged with two felony counts of criminal activity (App. 24). On January 18, 1990, the Department suspended Robert Jones without pay, pursuant to Article 27, §734A of the Annotated Code of Maryland. Id. Officer Jones had been employed by the Department since 1974, and was a non-probationary employee.

On September 7, 1990, Robert Jones was found guilty of the two felonies in the Circuit Court for Carroll County. Id. At that time, Jones' sentencing date was scheduled for December 18, 1990. On October 5, 1990, prior to his scheduled sentencing, the Baltimore City Police Department terminated Robert Jones. Id. In terminating Robert Jones, the Department relied on the provisions of Maryland's Law Enforcement Officers' Bill of Rights (LEOBR) Article 27, §730(c), even though Jones had not been sentenced.[1] Id.

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[1]Article 27, §730(c) of the LEOBR, which permits an officer to be terminated without a hearing if he is convicted of

In a letter dated October 10, 1990, Michael Fry, the then-Assistant Solicitor and legal counsel to the Department, indicated that if Jones received a probation before judgment (PBJ) at his sentencing, a trial board hearing would be "scheduled expeditiously." Id. On December 18, 1990, Jones was granted a PBJ under Article 27, §641 as to the felony charges which had been filed against him (App. 25).

After Jones received the PBJ, contrary to the earlier commitment of the Department's counsel, a trial board was not held. Instead, Jones was fired without a hearing of any sort. On April 19, 1991, Jones filed a Petition to Show Cause and for a Writ of Mandamus, asserting that the Department was denying him his rights under the LEOBR and the United States Constitution. In that Petition, Jones sought reinstatement with the Department, back pay, damages and attorney's fees.

After prevailing in the trial court, the Department appealed and the Maryland Court of Appeals granted certiorari on its own motion. On May 12, 1992, the Maryland Court of Appeals in Jones v. Baltimore City Police Department, 326 Md. 480, 606 A.2d 214 (1992), held that a PBJ is not a conviction within the meaning of §730(c) of the LEOBR, and that Jones was improperly dismissed without a hearing (App. 25). The Court of Appeals also concluded that Jones was entitled to a hearing under Article 27, §730(a) of the LEOBR before he could be discharged (App. 25).

A Departmental trial board was not held until December 16, 1992, almost seven months after the Court of Appeals' decision. Id. A second day of proceedings was held on March 23, 1993. Id. Jones was found guilty at the trial board, and

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a felony, may be unconstitutional on its face, but that issue is not before the Court at this time because the Court of Appeals held that a probation before judgment was not a conviction, and thus Jones was not terminated via this provision.

termination was recommended. The Commissioner accepted the trial board's recommendation, and Jones was terminated on April 19, 1993, three years and three months after his initial suspension without pay.

On September 2, 1993, Jones filed an Amended Petition to Show Cause and for a Writ of Mandamus, seeking reinstatement with back pay and benefits, damages and attorney's fees. In Count I, Jones claimed that his rights under the Constitution and the LEOBR were violated because the Department refused to rescind its termination order and reinstate Jones immediately after he was granted the PBJ, and because the Department refused to pay Jones such back pay and benefits that were denied him during his suspension without pay. Specifically as to the alleged constitutional violation, Jones stated in paragraph 11 of Count I:

> By refusing to rescind its termination order and immediately reinstate Robert Jones upon the striking of his guilty verdict, and pay him all salary and benefits due him since the granting of his PBJ, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United States.

App. 11. In paragraph 12, Jones alleged:

> By refusing to pay Robert Jones such backpay and benefits that were denied him during his suspension without pay, a suspension which should have been rescinded by the removal of charges against Robert Jones, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United

States.

Id.

In Count II of the Amended Petition, Jones asserted that the Baltimore City Police Department defamed him by providing false information regarding his employment status with the Department to three of Jones' potential civilian employers. Count III alleged a claim under 42 U.S. C. §1983.

On February 7, 1994, the Honorable Ellen M. Heller, of the Circuit Court for Baltimore City granted Jones' Motion for Partial Summary Judgment on his back pay claim (Count I) (App. 27). Judge Heller ordered that Jones be awarded back pay from January 18, 1990, when he was initially suspended without pay, to April 19, 1993, when his employment was lawfully terminated by the Department. Id. Judge Heller also granted summary judgment for the Department on the defamation claims (Count II) with respect to two of the three civilian employers. Id. On March 29, 1994, the Honorable Hilary D. Kaplan of the Circuit Court granted the Department's Motion for Summary Judgment with respect to the third and final civilian employer. Cross-appeals were filed to the Court of Special Appeals of Maryland regarding both the back pay and defamation claims.

The Court of Special Appeals of Maryland reversed the judgment of the Circuit Court ordering the Baltimore City Police Department to pay back pay to Jones (Count I), and affirmed the Circuit Court regarding the defamation claim (Count II) (App. at 22). Baltimore City Police Department v. Jones, No. 941, (Md. Ct. Spec. App. 1994).

Regarding the back pay claim, the Court of Special Appeals held that the Judge Heller erred as a matter of law in granting the Motion for Summary Judgment (App. 14). The Court held that the error occurred because the circuit court based its grant of summary judgment in part on the conclusion that Jones' January 19, 1990 suspension hearing was

470 U.S. 532 (1985), and that Jones' Amended Petition did not allege such a violation (App. at 15). Thus, the Court of Special Appeals found the issue to be immaterial and not before the Circuit Court. Id.

The Court also held that Jones was not entitled to receive back pay and benefits as a matter of law, based simply on the grant of probation before judgment (App. at 16). The Court stated that although Jones may have sustained some damages as a result of an unreasonable delay in affording him an administrative hearing on the merits of the charges against him, it was unreasonable to suggest that by virtue of the probation before judgment following the guilty verdict he was immediately entitled to be restored to the rank, pay and benefits of a police officer (App. at 17).

Jones filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland on March 31, 1995. The Department filed an answer to Petition on April 18, 1995. On August 21, 1995, the Court of Appeals denied Jones's Petition. Jones v. Baltimore City Police Department, et al., Petition Docket No. 85 (Md. 1995).

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD CLARIFY A SIGNIFICANT CONFLICT OF LAW REGARDING WHETHER AN IMPROPERLY TERMINATED EMPLOYEE IS ENTITLED TO BACK PAY UNTIL SUCH TIME AS THE EMPLOYEE IS SUBSEQUENTLY PROPERLY TERMINATED.

The issue in the instant case concerning police officers' fourteenth amendment procedural due process rights is an

important one which is in need of clarification by this Court. The issue is one for which there is a significant split of authority in both federal and state courts and which is bound to arise consistently on the dockets of various courts around the nation.

The guidance of this Court on this issue is necessary in order to delineate a clear rule of law regarding one of the most fundamental and important constitutional rights. The decision in Jones v. Baltimore City Police Department, et al. has only perpetuated a conflict of law which already exists. In addition, the opinion of the Court of Special Appeals of Maryland results in the police department having an unbridled ability to violate a public employee's vested right to procedural due process, and suffer no consequences.

A. The Issue of Whether an Improperly Terminated Employee Is Entitled to Back Pay until Such Time as the Employee Is Subsequently Properly Terminated Is an Important Constitutional Issue, Likely to Recur, That Is in Conflict in Both Federal and State Courts and Requires Clarification.

There is an apparent conflict in various courts around the country regarding the issue at bar. Presently, there are two divergent lines of cases that exist which result in two opposite results to the same constitutional question. One line of cases holds that improperly terminated employees are entitled to backpay, even if they are subsequently properly terminated. The Court of Appeals of Maryland so held in Lemlich v. Board of Trustees of Harford Community College, 282 Md. 495, 385 A.2d 1185 (1978). The court held that Lemlich was improperly

dismissed, id, at 504, 385 A.2d at 1190, although she could be terminated at a later date pursuant to a contract. Id. at 505, 385 A.2d at 1190. The Court of Appeals also held that Lemlich could recover lost wages for the intervening period. Id. at 505, 285 A.2d at 1191. See also Wellner v. Minnesota State Jr. College, 487 F.2d 153 (8th Cir. 1973), and Vega v. Civil Service Community of New York, 385 F. Supp. 1376 (S.D.N.Y. 1974).

Conversely, other cases have disallowed back pay when the employee is subsequently terminated properly. See, e.g. Gadsen Civil Service Board v. Phillips, 447 So. 2d 749 (Ala. Civ. App. 1983); Metropolitan Dade Co. v. Sokolowski, 439 So. 2d 932 (Fla. 1983) (involving suspensions); Migliore v. City of Lauderhill, 415 So. 2d 62, aff'd 431 So. 2d 986 (Fla. 1983); Savaglio v. Board of Fire and Police Commissioner's, 465 N.E. 2d 1065 (Ill. App. Ct. 1984).

In light of this conflict in the law, the instant case presents a particularly useful opportunity for this Court to create a clear standard as to what the responsibilities of the employer are regarding back pay and benefits in a situation where the employee is improperly terminated initially, and is then subsequently terminated properly. This is because in the instant case, there are three separate and distinct time periods in which to analyze the procedural due process rights at issue here. An analysis of these three time periods would allow this Court to provide a complete and detailed sense of direction to the courts around the nation regarding an issue which will inevitably arise constantly in the courts.

In the instant case, three individual temporal sections become important for analysis.[2] The first time period is from

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[2]A chronology of relevant events may aid the Court in examining this case:

January 18, 1990, the date of Robert Jones' original suspension without pay until December 18, 1990, when Robert Jones received his PBJ. The second time period is from December 18, 1990, the date when Mr. Jones received his PBJ until May 12, 1992, at which time the Court of Appeals of Maryland in Jones v. Baltimore City Police Department held that a PBJ was not a conviction. The third time period is from May 12, 1992, the date of the Court of Appeals' decision until April 19, 1993, at which time Robert Jones was terminated by the Department following his trial board. As the temporal periods move forward, the reasons for a granting of backpay become more compelling.

1. Constitutional Issues Regarding Pre-termination Suspensions.

Jones's suspension hearing was in no way a full evidentiary hearing. The only real issue in the suspension

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January 18, 1990 - Jones suspended without pay.
September 7, 1990 - Jones found guilty of a felony in circuit court.
October 5, 1990 - Department terminates Jones.
December 18, 1990 - Jones received PBJ.
May 12, 1992 - Court of Special Appeals' decision holding Jones' termination without hearing to be illegal.
December 16, 1992 - Jones' trial board (continued due to unavailable witness).
March 23, 1993 - Jones trial board concluded.
April 19, 1993 - Jones terminated.

hearing was whether Jones had been charged with a felony, not whether there was any basis to the underlying charge. The Law Enforcement Officers' Bill of Rights (LEOBR) authorizes suspension without pay if an officer is charged with a felony. However, the LEOBR is superseded by the United States Constitution and its guarantee of due process.

This Court has recognized the often inequitable, and always harsh and immediate impact of wage deprivation on employees awaiting a final determination of their status in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). In Loudermill, this Court expressly rejected the theory "that a public employee who may be discharged only for cause may be discharged by whatever procedures the legislature chooses." 470 U.S. at 548. (Marshall, J., concurring). Justice Marshall, in his concurrence with the Court's guarantee of procedural due process to public employees, also condemned the devastating disruptions caused by erroneous wage deprivation. Having recognized that "[d]uring this period [of wage deprivation] the employee is left in limbo, deprived of his sustenance," Justice Marshall further stated that "it is in no respect certain that a prompt post-deprivation [resolution] will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury." Id. at 549-50.

Clearly the type of irreparable injury alluded to by Justice Marshall is certain to befall law enforcement officers suspended without pay following a felony charge, pursuant to the LEOBR's §734A(3)(i). In the instant case, Jones was suspended without pay following his indictment on felony charges, before he was granted a PBJ. Thus, despite never having been convicted of the felony for which he was suspended, Jones still was forced to forfeit eleven months salary and benefits, from the date of his suspension until his PBJ. Even then, he did not receive what could by any definition be called a prompt hearing.

While the LEOBR does require a hearing under §734A(3)(ii), as mentioned above, the type of hearing applicable to Jones' situation is not specified. This lack of specificity allowed the Department to conduct a pro forma hearing in which Robert Jones was not given the opportunity to defend himself, present testimony or evidence. In fact, the Department's counsel has previously stipulated that Jones was not given any opportunity to actually respond to the basis of those charges. The only issue was whether Jones had or had not been charged with a felony, with no further consideration. The Circuit Court specifically noted that Jones "was not given any opportunity to actually respond to the basis of those charges, but only, both counsel have stipulated and agreed, given the opportunity to agree, in fact, that he had been charged with a felony."

If law enforcement agencies are not required to pay back salary and wages to officers suspended without pay due to felony charges which never result in convictions, law enforcement officers who are not convicted of those charges will be irreparably harmed. Such an issue should be clarified by this Court.

2. Constitutional Issues Regarding Terminations of Vested Employees without a Hearing.

The Department asserted below that the "inherent authority" of the Police Commissioner would allow him to suspend Jones regardless of the existence of LEOBR §734A. This premise is incorrect and would result in consequences not intended by the legislature in creating the LEOBR. Taking the Department's assertion to its logical conclusion, the

Commissioner would thus have the "inherent authority" to keep a person in a suspended without pay status forever, even if the person was given a PBJ or found not guilty. This assertion again is representative of the manner in which the Department has approached the instant case, asserting some absolute fiat. While the Commissioner of Police is granted broad authority, his "inherent authority" does not permit him to violate the United States Constitution.

Jones' claim for backpay is well supported: "The measure of damages in an action for wrongful discharge is prima facie the employee's salary for the remainder of the period of employment." Atholwood Development Co. v. Houston, 179 Md. 441, 446, 19 A.2d 706, 708 (1941).

In Lemlich v. Board of Trustees of Hartford Community College, 282 Md. 495, 385 A.2d 1185 (1978), Mrs. Lemlich, a faculty member, allegedly resigned her position by oral notice to the college president. Id. at 495, 385 A.2d at 1187. Shortly thereafter, Mrs. Lemlich requested a withdrawal of her resignation. Id. at 499, 385 A.2d at 1188. On October 30, 1975, prior to the Board of Trustees taking any action relative to the pending resignation of Mrs. Lemlich, her attorney addressed the Board, tendering "an unconditional withdrawal of the tendered resignation before it was accepted." Id., at 503, 385 A.2d at 1190.

The day after, on October 31, 1975, the college president, at the direction of the board, sent Mrs. Lemlich a letter accepting her resignation. Id. at 505, 385 A.2d at 1190. The Court of Appeals held that under Maryland law only the Board of Trustees retained authority to accept a faculty resignation. Id. at 501, 385 A.2d at 1188. The Court also ruled that the "offer to resign was withdrawn prior to acceptance," and thus, Mrs. Lemlich was improperly dismissed. Id. at 504, 385 A.2d at 1190. It was determined by the Court, that due to contractual clauses, Mrs. Lemlich could properly be terminated on June 30, 1976. Id. at 505, 385 A.2d at 1190. Regarding the

issue of backpay, the Court held that Mrs. Lemlich was entitled to recover lost wages from the time of her improper discharge until the legal termination. Id. at 505, 285 A.2d at 1191. A "wrongfully discharged employee is entitled to recover damages to the extent of the stipulated salary for stipulated period, less the amount he actually earned during that period, or the amount he might have earned after his discharge by the exercise of reasonable diligence in seeking other employment in the same or similar business." Id. at 505, 385 A.2d at 1191, quoting with approval Volas, Ltd. v. Soelera, 264 Md. 155, 175, 286 A.2d 101, 111 (1972). "Moreover, a wrongfully discharged employee is entitled to reimbursement for his reasonable and necessary expenses incurred in searching for other employment." Lemlich, 282 Md. at 505, 385 A.2d at 1191.

In this case, Jones' wrongful discharge arose because he was not afforded a trial board hearing following his receipt of a PBJ. Unlike Lemlich, Officer Jones is not a contractual employee with a limited term of employment. Instead, Officer Jones is a vested public employee whose employment term is not subject to a time limitation.[3] Therefore, his right to receive wages continued until he was reinstated or provided with a proper trial board hearing.

In Wellner v. Minnesota State Jr. College, 487 F.2d 153 (8th Cir. 1973) a non-tenured teacher was improperly discharged because he was not given an appropriate hearing prior to his discharge. The Court held that this termination was a nullity and, therefore, Wellner remained on the payroll until a proper hearing was held. Id. at 157. Jones, like Wellner, was deprived of procedural due process in that he also was discharged without a proper hearing. This resulted in Jones'

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[3]See §16-10(e)(2), Code of Public Local Laws of Baltimore City, indicating that officers are probationary for a period of one year.

loss of a vested right. Cf. Board of Regents v. Roth, 408 U.S. 564 (1972), Perry v. Sinderman, 408 U.S. 593 (1972).

In Gurmankin v. Costanzo, 626 F.2d 1115, 1121 (3rd Cir. 1980), cert. denied, 450 U.S. 923 (1981) the court held that the principle of awarding relief in the form of backpay and seniority in an employment discrimination case does not differ when the basis of the underlying right is the constitution rather than a statute. In the instant case, Officer Jones' right to backpay is established by both constitutional and statutory standards. Because he was a vested employee, he has a fourteenth amendment due process right to procedural safeguards prior to termination and as a law enforcement officer he is also protected by the LEOBR, a statutory standard. Gurmankin based the relief of the award of backpay on the "make whole" standard. This standard is founded on the principle that the victim should be restored as fully as possible to the economic position in which he or she would have been in the absence of the discrimination. Id. at 1121.

Regardless of the trial board's ultimate decision to terminate Jones, he is entitled to backpay to the date his termination was lawfully effected. Officer Jones' right to receive backpay is not affected by the decision of the trial board. His right arises because the Department refused to provide him with a pre-termination hearing following his receipt of the PBJ. Instead the Department relied on the erroneous belief that a PBJ was a conviction. The Court of Appeals' decision made clear the error of the Department's reasoning and actions. If subsequent actions of the trial board are permitted to justify their improper actions, the procedural safeguards of the fourteenth amendment would be rendered meaningless. The effect would be to encourage a recommendation of termination at any subsequent hearing. Indeed, the Department could fire individuals illegally with no subsequent consequences.

The Court in Wellner held that regardless of the board's ultimate decision, because the termination was procedurally

flawed, Wellner "remained on the payroll and is entitled to receive the wages he would have earned" until the proper hearing is conducted less any income earned from other employment. Wellner, 487 F.2d at 157.

Similarly, in Vega v. Civil Service Commission City of New York, 385 F.Supp. at 1376, the Court held that the Civil Service Commission erred in discharging the Plaintiff, a Correctional Officer, without a hearing. Because the Plaintiff was a tenured public employee, he was entitled to all the protection of the fourteenth amendment, and this summary dismissal violated the fourteenth amendment. Id. at 1377-78. Also, because he attained a tenured status, the court determined that the only appropriate remedy was to reinstate the Plaintiff to his position with backpay retroactive to the date of his discharge.

In Vega, there was no indication that the Department's future actions, if they decided to hold a proper hearing, would have any bearing on the Plaintiff's right to reinstatement and backpay. The court held that "[i]n light of the Defendant's utter disregard of the Plaintiff's due process rights, the only appropriate remedy lies in the Plaintiff's reinstatement to the position . . . with backpay retroactive to the date of his discharge." Id. at 1382.

3. Constitutional Issues Following a Judicial Findng that a Termination was Illegal.

In Jones, 326 Md. at 480, 606 A.2d at 214, the Court of Appeals held that, because a PBJ is not a conviction within the meaning of §730(c) of the LEOBR, Jones was improperly discharged without a hearing. Subsequent to this ruling, the Department was fully aware of its responsibility to schedule a trial board. The Department could have scheduled a trial board

for Jones within a month if it chose to do so. However, even in the wake of a ruling by Maryland's highest court, the Department did not schedule a trial board until December 16, 1992, seven months after the Jones decision. Jones was not properly discharged by the Department until April 19, 1993.

The reasons for granting backpay to Jones are the most compelling in this temporal period. The relevant case law regarding backpay, cited in section 2, supra, becomes most applicable during this period because the Department has no excuse whatsoever for denying Jones his constitutional rights for an additional seven months. After the decision of the Court of Appeals, the Department knew or should have known that Jones was not legally terminated. The unwarranted delay in scheduling a hearing only exacerbated the constitutional violation.

B. The Court of Special Appeals Thus Failed to Address Important Constitutional Questions Regarding Backpay of Illegally Terminated Police.

In deciding against Jones, the Court of Special Appeals did not reach the merits on the issue of backpay for an employee improperly terminated -- an important issue on which there is a significant divergence of opinion.[4] Instead, the court relied on several procedural issues which misinterpreted the procedural history and allegations.

First, the Court of Special Appeals erroneously delimited the period for which relief was sought, finding that the

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[4]See discussion infra at 10.

period was from December 18, 1990 (when Jones received the probation before judgment), to April 19, 1993, when his employment was terminated after a proper trial board (App. at 13). In excluding from consideration the period from Jones' suspension without pay on January 18, 1990, to the PBJ on December 18, 1990, the Court of Special Appeals adopted a reading of the Jones' Amended Complaint which is simply contrary to the language employed.[5]

The Court of Special Appeals pointed to the language of paragraphs 11 and 12 of Jones' Amended Petition (App. at 11-13) The court correctly noted that paragraph 11 sought backpay from the time of the probation before judgment to the date of the proper termination. The Court of Special Appeals then concluded that paragraph 12 sought the same relief. Id. Not only would this render paragraph 12 mere surplusage, but it overlooks the language of the paragraph:

> By refusing to pay Robert Jones such back pay and benefits that were denied him during his suspension without pay, a suspension which should have been rescinded by the removal of charges against Robert Jones, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United States.

App. at 11.

The removal of charges came with the resolution of the

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[5]Neither the Department's counsel nor the circuit court judge interpreted the claim in the manner the Court of Special Appeals did.

case, i.e. Jones' PBJ. Therefore, paragraph 11 addressed the post-PBJ time period, and paragraph 12 addressed the pre-PBJ period. This was because Jones realized the legal analysis for the two periods may be distinct, and that he might prevail as to one and not the other. In fact, in his Memorandum of Law, filed contemporaneously with his original Complaint, Jones broke the periods down further, in reverse chronological order. In Argument I, Jones addressed the period from the Court of Appeal's decision on May 12, 1992, and moving forward. In Argument II, Jones addressed the period beginning with the date of his termination, notwithstanding the PBJ. In fact, lest there be any confusion, Jones stated at page 10:

> By not addressing the back pay issue in their opinion, the Court of Appeals has forced Jones into litigating this issue separately. Therefore, to avoid a multiplicity of law suits, Jones addresses issues of back pay not only from the Court of Appeals decision to the present, but also from his suspension to the circuit court's granting of a PBJ and from the date of the PBJ to the Court of Appeals decision.

(emphasis added). Accordingly, in Argument III of his Memorandum, Jones addressed the legality of the emergency suspension without pay. Id. at 16-19. Further support for the nature of the relief appears in the "Wherefore" clause, also cited by the Court of Special Appeals. Paragraph B asked for all salaries Jones did not receive during his suspension without pay, and for salaries from the PBJ to the present (App. at 12). How this could be read to mean something other than all salaries during the suspension without pay, which began on January 18, 1990, is beyond explanation. Therefore, not only did Jones provide notice pleading, but he carefully outlined the three time periods in his original memorandum.

The Court of Special Appeals of Maryland engaged in a similarly strained analysis in determining that Jones had not raised a constitutional claim. In Part B of its opinion, the intermediate court refused to consider the merits of the due process issue (the basis for the circuit court's opinion in favor of Jones) (App. at 15). The sole basis for this refusal was that Jones had not raised the due process issue. Id.

Paragraphs 11 and 12 of the Amended Complaint[6] again demonstrate Jones' allegations. Both paragraphs clearly allege that the Department's actions violated Jones' right to a hearing "under the LEOBR and the 14th Amendment to the Constitution of the United States." (emphasis added). Furthermore, Court III alleges a claim under 42 U.S.C. §1983, which in turn forbids a deprivation, under color of state law, of any "rights, privileges, or immunities secured by the Constitution and laws."

Beyond such notice pleading, Jones went to great lengths to spell out the nature of his claim in the Memorandum filed contemporaneously with the original complaint. The memorandum contained discussion of Loudermill, and Argument IV of the memo is devoted to arguing the unconstitutionality, both on its face and as applied, of art. 27, §734A of the Maryland Code, the section under which Jones was suspended without pay.[7] Therefore, the Court of Special Appeals erred by holding that Jones did not raise the due process issue, and in doing so failed to address this important

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[6]These paragraphs were not changed from the original complaint.

[7]No allegation of failure to raise the constitutional issue was made by the Department or court in circuit court, nor was it addressed in briefs or oral argument in the Court of Special Appeals.

constitutional issue.

CONCLUSION

Refusing to reimburse back pay to an improperly terminated employee for the period of time until he is subsequently properly terminated is a violation of the employee's fourteenth amendment due process rights. Certiorari is desirable in this case because a resolution of the issues at bar would delineate a clear standard in an area of due process law in which there currently exists a significant split of authority, and in which the situation is likely to recur. Additionally, a grant of certiorari would address the opinion of the Court of Special Appeals of Maryland, which results in the Department having an unbridled ability to strip an employee of his vested right to procedural due process.

Respectfully submitted

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Counsel for Petitioner

ROBERT JONES	*	In the
	*	Court of Appeals
v.	*	of Maryland
BALTIMORE CITY POLICE DEPT., et al.	*	Petition Docket No. 85, Sept. Term 1995
	*	(No. 941, Sept. Term 1994, Court of Special
	*	Appeals)

ORDER

Upon consideration of the petiton for a writ of certiorari ot the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: August 21, 1995

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 941

September Term, 1994

BALTIMORE CITY POLICE DEPARTMENT, ET AL.

v.

ROBERT JONES

Bloom,
Wenner,
Davis,

J.J.

Per Curiam

Filed: February 15, 1995

OPINION

Former Baltimore City Police Officer Robert A. Jones brought an action against the Baltimore City Police Department and Police Commissioner Thomas Frazier (hereinafter collectively referred to as the "Department") for a writ of mandamus to order the Department to reinstate Jones as a police officer with back pay and benefits (Count I), defamation (Count II), and costs and counsel fees under 42 U.S.C. § 1983 for violating Jones's rights under color of state law (Count III). The Circuit Court for Baltimore City granted Jones's motion for summary judgment on his claim for back pay, ordering the Department to pay Jones back pay for the period from 18 January 1990 (when Jones was suspended without pay) through 19 April 1993 (when Jones's employment was finally terminated). Thereafter, the court granted the Department's motion for summary judgment as to the defamation action.

In its appeal from the judgment ordering it to pay back wages to Jones, the Department contends that "the trial court erred in awarding back pay to a police officer who had been suspended after being charged with two felonies relating to child pornography and who was later found to have committed the crimes." Cross-appealing from the summary judgment in favor of the Department on the defamation count, Jones asserts that "the trial court erred in ruling that the Baltimore City Police Department did not defame a police officer by providing false information as to his employment."

FACTUAL HISTORY

On 12 January 1990, Officer Robert A. Jones of the Baltimore City Police Department was charged, in the District Court for Carroll County, with two felony counts of distribution of , and possession with intent to distribute, child pornography under Maryland Code (1957, 1988 Repl. Vol.), Art. 27, §

419A, and with four misdemeanor counts involving obscene matter under Art. 27, § 418. Pursuant to Art. 27, § 734A (3),[1] Jones was suspended from duty without pay on 18 January and an administrative suspension hearing was held by the Department on 19 January 1990. The only issue that was addressed at that hearing was whether Jones had been charged with a felony; the hearing did not address the merits of the charges against him. After criminal charges were filed against Jones in the Circuit Court for Carroll County, a trial was held before the court on 7 September 1990, and Jones was found guilty of both felony counts.[2] A sentencing hearing was scheduled for 18 December 1990.

On 5 October 1990, having concluded that Jones had been "convicted of a felony" within the meaning of Art. 27, § 730(c),[3] the Department terminated his employment without

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[1]Maryland Code (1957, 1992 Repl. Vol.), Art. 27, § 734A (3) provides as follows:

> (i) Emergency suspension of police powers without pay may be imposed by the chief if a law enforcement officer has been charged with the commission of a felony.
>
> (ii) Any person so suspended shall be entitled to a prompt hearing.

[2]The misdemeanor charges were nolle prossed by the State.

[3]Maryland Code (1957, 1992 Repl. Vol.), Art. 27, § 730(c) provides as follows:

holding a hearing to address the merits of the charges. On 10 October 1990, the Assistant City Solicitor representing the Department informed Jones's attorney in writing that "[i]n the event that Mr. Jones receives [probation before judgment] at his sentencing, the Personnel Order [that terminated his employment] will be immediately rescinded and a trial board scheduled expeditiously."

On 18 December 1990, the circuit court (Beck, J.) stayed the entry of judgment, deferred further proceedings, and placed Jones on probation for three years pursuant to Art. 27, § 641. The Department, however, did not rescind the personnel order terminating Jones's employment and did not schedule a trial board hearing to address the administrative charges against Jones, which included the felony charges.

On 19 April 1991, Jones filed in the Circuit Court for Baltimore City a Petition to Show Cause and for a Writ of Mandamus, alleging that the Department was denying him his rights under the Law Enforcement Officers' Bill of Rights (LEOBR) and the United States Constitution. In that petition, Jones sought reinstatement with the Department, back pay, damages, and attorneys' fees. The Department moved to dismiss the petition, in part, on the grounds that, under Art. 27, § 730(c), Jones could be discharged without a hearing because he had been convicted of a felony.

After a hearing on the issue of whether Jones had been "convicted" of a felony, the Circuit Court for Baltimore City (Byrnes, J.) held that a guilty verdict was a conviction within the meaning of Art. 27, § 730(c) and that the conviction was not altered by the subsequent entry of probation before judgment. Accordingly, the court held that Jones was lawfully

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(c) *Hearings for convicted felons.* -- A law enforcement officer is not entitled to a hearing under this section if the law enforcement officer has been charged and convicted of a felony.

discharged without a hearing.

Following Jones's appeal to this Court but prior to our review, the Court of Appeals issued a writ of certiorari on its own motion to decide "whether an officer has been 'convicted of a felony' within the meaning of [Art. 27,] § 730 (c) when that officer has been found guilty of a felony but granted probation before judgment pursuant to Art. 27, § 641 of the Code." *Jones v. Baltimore City Police Dep't*, 326 Md. 480, 481 (1992). The Court of Appeals held that Jones's "probation before judgment under § 641 is not a 'conviction,' and a person who received probation before judgment is not convicted of the crime for which he has been found guilty, unless the person violates the probation order and a court enters a judgment on the finding of guilt." *Jones*, 326 Md. at 489 (quoting *Myers v. State*, 303 Md. 639, 647-48 (1985)). Concluding that "the legislature intended the preclusive effect of § 730(c) of the LEOBR to operate only when the conviction of a law enforcement officer for a felony was a conviction in the legal and technical sense, i.e., a judgment of conviction," *id.*, the Court concluded that Jone's discharge was invalid and remanded the case to the circuit court, stating that Jones was entitled to a hearing under Art. 27, § 730(a)[4] of the LEOBR before being discharged. *Id.* at 490.

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[4]Maryland Code (1957, 1992 Repl. Vol.), Art. 27, § 730(a) provides, in part, as follows:

(a) Notice; record. -- If the investigation or interrogation of a law enforcement officer results in the recommendation of some action, such as demotion, dismissal, transfer, loss of pay, reassignment, or similar action which would be considered a punitive measure, then, except as provided under subsection (c) of this section and except in the case of summary punishment or emergency suspension as allowed by § 734A of this subtitle and before taking that action, the law enforcement agency shall give notice to the law

Because Jones's discharge on 5 October 1990 was invalid, the Court concluded that "Jones' current legal status continues to be suspension without pay...." *Id.*

On 16 December 1992 (seven months after the Court of Appeals opinion in *Jones* was filed) and 23 March 1993, a Departmental Trial Board held hearings to determine an appropriate course of disciplinary action. The Board found appellee guilty of two felony counts of distribution of, and possession with intent to distribute, child pornography. Appellee was also found guilty of "bring[ing] discredit upon himself and the department." In Personnel Order 335-93, which was issued 19 April 1993, the Commissioner adopted the Trial Board's recommendation and terminated appellee's employment retroactive to 15 April 1993.

On 2 September 1993, appellee filed an Amended Petition to Show Cause and for a Writ of Mandamus (Amended Petition), seeking reinstatement with back pay and benefits, damages, and attorneys' fees. In Count I of his Amended Petition, appellee alleged that appellant denied him his rights under the LEOBR, Art. 27, §§ 727-734D, and the Fourteenth Amendment to the United States Constitution. In Count II, appellee alleged that appellant defamed him by providing false information regarding his employment status with the Baltimore City Police Department to CMC Computers, Inc. (CMC), Lennie's Body Shop and Auto Repair (Lennie's), and American College Testing (ACT). In Count III, appellee alleged that appellant's acts "were taken under color of state law" and, therefore, violated his rights under 42 U.S.C. § 1983.

On 7 February 1994, the circuit court granted appellee's Motion for Partial Summary Judgment on Count I of his Amended Petition and ordered that he be awarded back pay

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enforcement officer that he is entitled to a hearing on the issues by a hearing board.

from 18 January 1990, when he initially was suspended without pay, to 19 April 1993, when his employment was terminated lawfully after an administrative hearing addressing the merits of the charges against him. The court granted appellant's motion for summary judgment, in part, on the defamation claims in Count II of appellee's Amended Petition with respect to CMC and ACT and denied appellants' motion with respect to Lennie's. On 29 March 1994, the court granted appellant's subsequent motion for summary judgment with respect to the Lennie's defamation claim, and these cross-appeals were filed.

JURISDICTIONAL CONSIDERATIONS

Before addressing the issues raised by the parties, we must consider a point that was ignored by them but that is essential to our jurisdiction to entertain these appeals. With but a few exceptions, none of which are applicable to this case, there is no right of appeal in the absence of a final judgment. Md. Code (1974, 1989 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article; *Wright v. Nugent*, 23 Md. App. 337, *aff'd*, 275 Md. 290 (1974). An order or other form of decision that adjudicates fewer than all the claims in an action is not a final judgment unless the trial court expressly determines in a written order that there is no just reason for delay and directs in the order the entry of a final judgment as to one or more but fewer than all of the claims or parties. Md. Rule 2-602; *see Russell v. American Security Bank*, 65 Md. App. 199 (1985). Jurisdiction under this rule cannot be conferred by the parties. *Lewis v. Lewis*, 290 Md. 175 (1981).

As used in Rule 2-602, "claim" means a substantive cause of action. *Suitland Dev. Corp. v. Merchants Mfg. Co.*, 254 Md. 43 (1969). If two purportedly separate "claims" are actually the same cause of action, then only one claim is presented. *East v. Gilchrist*, 293 Md. 453 (1982). Multiple counts presenting different legal theories for the same recovery

based on the same facts of transaction do not constitute separate claims under this Rule. *Biro v. Schombert*, 285 Md. 290 (1979). Thus, if two counts are merely variations of legal theories upon which there can be but a single recovery, there is but one claim. *Diener Enterprises v. Miller*, 266 Md. 551 (1972). In this case, one judge of the circuit court disposed of Count I of the amended complaint by granting summary judgment in favor of the plaintiff, and another judge disposed of Count II by granting summary judgment for the defendant. No judgment was entered on Count III, however. Counts I and III were based entirely on the same facts, Count I seeking relief by way of mandamus and Count III seeking "the reasonable costs and attorney fees necessary to bring this action," on the theory that the alleged wrongful acts of the Department were committed under color of state law in violation of 42 U.S.C. § 1983, and also requesting "such other and further relief as the nature of his cause may require." If the request for general relief can be deemed to be one for damages, such a request would not make Count III one whit different from the claim asserted in Count I, since damages may be awarded in a successful mandamus action. Md. Rule BE44. As Judge Cathell, writing for this Court in *Hess Construction Company v. Board of Education of Prince George's County*, __ Md. App. __ (No. 692, September Term, 1994, filed 5 January 1995), pointed out, however, attorneys' fees cannot be awarded as part of the damages in a mandamus action. To the extent, therefore, that Count III seeks attorneys' fees under 42 U.S.C. § 1983 (but only to that extent) it is not exactly the same cause of action or claim as set forth in Count I, *i.e.*, a mere variation of the same claim under a different legal theory, for which but one recovery can be had.

At first glance, therefore, it would appear that the failure to resolve the claim for counsel fees pursuant to 42 U.S.C. § 1983 asserted in Count III would keep the judgments rendered on Counts I and II from being final and appealable under Md.

Rule 1-602 (a) in the absence of an express determination that there is no just reason for delay and an order directing entry of a final judgment under Rule 2-602 (b). Nevertheless, as we pointed out in *Larche v. Car Wholesaler, Inc.*, No. 1817, 1989 Md. App. Lexus 195 (Oct. 31, 1989),[5] by analogy to a claim for attorneys' fees under 42 U.S.C. 1983, a claim for counsel fees under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. § 2310 (d) and (e), is collateral to the claim for damages under that statute (although the Magnuson-Moss Act, like 42 U.S.C. § 1983, provides that an award for counsel fees would be part of the costs and thus part of the judgment); therefore, and appeal from a judgment for damages under the statute can be maintained even though the claim for attorneys' fees is still pending.

We conclude, therefore, that despite the absence of a final disposition of Count III of the amended petition, the judgments on Counts I and II are final and appealable and the issues raised in these cross-appeals are properly before us for determination.

SUMMARY JUDGMENTS GENERALLY

A trial court may grant summary judgment when pre-trial documents demonstrate that there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501 (e); *Rosenberg v. Helinski*, 328 Md. 664, 674 (1992). Thus, when reviewing the grant of a motion for summary judgment, we must determine whether a dispute exists as to material facts, *Berkey v. Delia*, 287 Md.

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[5]Substituted for recalled opinion dated 5 September 1989 and reported in 80 Md. App. 322 (1989). With respect to the issue referred to herein, there is no difference between the substituted opinion and the recalled opinion.

302, 304-305 (1980), and "whether the trial court was legally correct." *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737 (1992). We shall review the grants of summary judgment in this case with those considerations in mind.

THE JUDGMENT AWARDING BACK PAY

A. Appellee's Amended Petition

Jones's Amended Petition alleged that the Department violated his rights in the following ways:

> 11. By refusing to rescind its termination order and immediately reinstate Robert Jones upon the striking of his guilty verdict, and pay him all salary and benefits due him *since the granting of his [probation before judgment]*, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United States.
>
> 12. By refusing to pay Robert Jones such back pay and benefits that were denied him during his suspension without pay, *a suspension which should have been rescinded by the removal of charges against Robert Jones*, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United States.

(Emphasis added). The wrongful conduct by the Department alleged in paragraph 11 as having violated Jones's rights was the

failure to reinstate him after he was granted probation before judgment, thus depriving him of the salary and benefits that he would have earned if the had been reinstated at that time. The wrongful conduct by the Department alleged in paragraph 12 was essentially the same as that alleged in paragraph 11: That Jones's rights were violated because his suspension should have been rescinded when the charges against him were removed by the grant of probation before judgment.[6] Thus, the Amended Petition essentially contends that Jones was unlawfully suspended without pay only from 18 December 1990, when he received a grant of pay to 19 April 1993, when his employment was terminated after a trial board hearing addressing the merits of the charges.

To compensate for the alleged violations of his rights committed by the Department, Jones requested in his Amended Petition that the Department "show cause" why he should not be reinstated and that he be granted "such other and further relief as the nature of his cause may require." He also requested the following relief:

> B. that [the circuit court] order that Robert Jones be compensated by the Defendants for *all salaries he did not receive during his suspension without pay*, and for all salaries which he would have received *from the time of his [probation before judgment] until present*,

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[6]These allegations are consistent with Jones's contention that, under United States v. Villamonte-Marquez, 462 U.S. 579, 581-82 n.2 (1983), the felony charges against him "merged" into the grant of probation before judgment. Jones asserts, therefore, that he was no longer "charged with the commission of a felony" after receiving the grant of probation before judgment and could not be suspended without pay under Art. 27, § 734A(3) (i).

with statutory interest;

> C. that [the circuit court] issue a writ of Mandamus to Edward V. Woods, Commissioner of the Baltimore City Police Department, compelling the Commissioner to immediately reinstate the Plaintiff, *and to pay him such backpay and benefits that were not paid due to the Commissioner's illegal action;....*

(Emphasis added.)

Jones's general request for "all salaries he did not receive during his suspension without pay" and his request for "such other and further relief as the nature of his cause may require" are phrased so generally that, standing alone, they might be interpreted as a request for back pay and benefits for the entire period from 18 January 1990, when he initially was suspended without pay, to 19 April 1993, when he was properly discharged from his employment. The relief sought, however, must be interpreted in the context of the entire Amended Petition, and specifically in light of what was alleged, in paragraphs 11 and 12 of his Amended Petition, to have constituted the unlawful acts committed by the Department. Under these circumstances, we interpret the general prayers for relief in the form of back wages as applying only to the time period during which Jones alleges that he was unlawfully deprived of his rights, *i.e.*, the period from 18 December 1990 to 19 April 1993.

Having established what conduct by the Department was alleged by Jones to have violated his rights and what relief he requested in Count I of his Amended Complaint, we shall examine the basis for the circuit court's decision to grant Jones's motion for summary judgment.

B. The Circuit Court's Decision

In its Memorandum and Opinion, which was read into the record on 7 February 1994, the circuit court examined all of the actions taken by the Baltimore City Police Department against Jones to determine whether those actions satisfied the standards of due process enunciated in the United States Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Initially, the court found that, because he was a public employee, Jones had a property right in his job that could not be dispossessed by the Department without due process. Interpreting what procedures satisfy due process under *Loudermill*, the court stated that "when a public employee is suspended, until there is actually an opportunity for some type of hearing on the merits, a public employer must continue paying that employee pay." The court noted that, although the suspension hearing that was held pursuant to Art. 27, § 734A(3)(ii) on 19 January 1990 allowed Jones to address the issue of whether he was, in fact, charged with a felony, it did not permit him to respond to the merits of the charges against him. Because Jones was suspended without pay as a result of that hearing, the court found that his due process rights had been violated by the initial suspension. According to the court, "it was only after he had the full opportunity for a hearing [addressing the charges]" that Jones's due process rights were satisfied and his employment could be terminated lawfully. Concluding that Jones received such a hearing on 16 December 1992 and 23 March 1993, thereby making the termination of his employment on 19 April 1993 lawful, the court awarded him back pay from 18 January 1990 to 19 April 1993.

We hold that the circuit court erred as a matter of law

in granting Jones's motion for summary judgment on Count I of his Amended Complaint. Jones essentially alleged in his Amended Petition that he was suspended without pay unlawfully from 18 December 1990, when he was granted probation before judgment, to 19 April 1993, when his employment was terminated after an administrative hearing under Art. 27, § 730. The circuit court, however, based its grant of summary judgment, in part, on its conclusion that the administrative hearing under Art. 27, § 734A(3) (ii) that Jones received on 19 January 1990 was unconstitutional under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 544-46. Although Jones did argue in his Motion for Partial Summary Judgment that that hearing violated his due process rights, the fact that his Amended Petition does not allege such a violation means that the issue was not before the court and, therefore, was immaterial. *See Carter v. Baltimore Gas and Elec. co.*, 25, Md. App. 717, 723 (1975) (stating that the function of pleadings in summary judgment cases is to frame the issues so that the court may determine materiality). By granting summary judgment based on an immaterial issue, the circuit erred as a matter of law and, therefore, we must reverse the judgment.

Additionally, we note that Jones apparently neither requested an administrative hearing addressing the merits of the felony charges prior the grant of probation before judgment, as he could have under Art. 27, § 734,[7] nor objected to the hearing

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[7]Maryland Code (1957, 1992 Repl. Vol.), Art. 27, § 734 states as follows:

Any law enforcement officer who is denied any right afforded by this subtitle may apply at any time prior to the commencement of the hearing before the hearing board... to the circuit court of the county where he is regularly employed for any order directing the law enforcement agency to show cause

that was held on 19 January 1990. Jones never requested and, indeed it would be difficult for us to believe that he wanted a full administrative hearing on the merits of the felony charges prior to his trial in the circuit court. The procedural aspects of administrative hearings under Art. 27, § 730 are not equivalent to those of judicial proceedings. *Widomski v. Chief of Police of Baltimore County*, 41 Md. App. 361, 378 (1979) (citations omitted). The admission of evidence is not governed by "the technical common law rules of evidence," *id.* (citations omitted), and the rules of criminal procedure need not be adhered to strictly, *id.* at 379-80. Therefore, had there been an administrative hearing on the merits, Jones would have been tried on the two felony charges under far less procedural protection than he was entitled to and eventually received in the circuit court trial on the criminal charges. An administrative hearing on the merits of the alleged felonious conduct, in addition to revealing appellee's defenses and strategies, might well have brought to light information that could later be used against Jones in court. Moreover, because Jones faced the far more onerous penalty of a prison sentence if he were convicted of the felonies in the circuit court, it would certainly have been in his best interest to delay exposing himself to the scrutiny of an administrative hearing on the merits of the felony charges until after his trial in the circuit court.

We need not determine whether Jones is entitled to damages for the violations of his rights under the LEOBR and the United States Constitution that he alleges occurred between 18 December 1990 and 19 April 1993. Even if he is entitled to damages that he allegedly suffered as a result of being denied the administrative hearing on the merits of the felony charges that he was entitled to receive pursuant to Art. 27, § 730(a) within a reasonable time after he was granted probation before

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why the right should not be afforded.

judgment on the criminal charges, Jones is not entitled to receive back pay and benefits as a matter of law. Although the Department's termination of this employment on 5 October 1990 was held to be invalid, Jones was not absolutely entitled to be reinstated as a police officer between 18 December 1990 and 19 April 1993, the time period for which he requested back pay and benefits in his Amended Petition. He had been found guilty of two felony charges following a trial before the Circuit Court for Carroll County on 7 September 1990. The same conduct that led to the guilty verdicts in the criminal case was the basis for his entirely proper, but belated, discharge. That he had committed the felonies was never equally in question during the time period in dispute, and the termination of his employment following an administrative hearing on the issues was inevitable. Under the circumstances, we do not believe that Jones was entitled to be reinstated as a police officer between 18 December and 19 April 1993 and, because he was not, we do not believe that he is entitled as a matter of law to back pay and benefits. He may have sustained some damages as a result of an unreasonable delay in affording him an administrative hearing on the merits of the charges against him, but it is unreasonable to suggest that by virtue of the probation before judgment following the guilty verdict he was immediately entitled to be restored to the rank, pay, and benefits of a police officer.

THE DEFAMATION CLAIM

In his cross appeal, Jones asserts that the circuit court erred in granting appellant's motion for summary judgment on the defamation claim. The facts that form the basis for that claim are summarized below.

In June 1992, Jones applied for employment with Lennie's Body Shop and Auto Repair. On his employment application form, he stated that he was currently employed by

the Baltimore City Police Department. At the time he made that statement, his legal status with the Baltimore City Police Department technically "continue[d] to be suspension without pay," since the Court of Appeals had invalidated the 5 October 1990 termination of his employment. *Jones*, 326 Md. at 490. When the owner of Lennie's, Leonard Medicus, contacted the Baltimore City Police Department, however, he was told that the Department had discharged Jones in October 1990. Medicus stated that it was because of this discrepancy between Jones's employment application and the information that Medicus received from the Police Department, that he chose not to hire appellee. Jones contends in Count II of his Amended Complaint that he was defamed when the Department incorrectly informed Medicus that his employment was terminated in October 1990.

The circuit court concluded that, because Jones was a policeman, he qualified as a "public official" under *New York Times v. Sullivan*, 376 U.S. 254 (1964). Thus, in order to recover for the Department's alleged defamatory statements, Jones had to establish that the Department made the statement knowing that it was false, or with a reckless disregard for the truth. *Berkey v. Kelia*, 287 Md. 302, 314 (1980). Applying this standard, the court granted summary judgment because "the failure of the police department to rectify its records to read 'suspended without pay' five and half weeks or so subsequent to the opinion coming down from the Court of Special [sic] Appeals" did not constitute a reckless disregard for the truth on the part of the Department. The circuit court further stated that, in the alternative, the communication between the Department and Medicus arose out of the employer-employee relationship and therefore it was protected by "a qualified privilege."

Because we find that no factual disputes exist with respect to the defamation claim, we affirm the circuit court's grant of summary judgment. We affirm, however, on grounds

not addressed by the lower court. *See Maryland Casualty Co. v. Lorkovic*, 100 Md. App. 333, 357-58 (1994) (stating that reviewing court may affirm grant of summary judgment on grounds not ruled on by trial court where party is entitled to judgment as a matter of law on those grounds). We conclude that the statement at issue was not a defamatory communication and, therefore, Jones failed to establish the first element of a defamation claim.

> To establish a case of defamation,
>
> > the plaintiff must show (1) that the defendant made a defamatory communication--i.e., that he communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.

Kairys v. Douglas Stereo Inc., 83 Md. App. 667, 678 (1990) (citations omitted); *see also Rosenberg v. Helinski*, 328 Md. 664, 675 (1992), *cert denied*, __ U.S. __, 113 S. Ct. 3041 (1993).

In the case *sub judice*, we conclude that, as a matter of law, the Department's statement did not constitute a "defamatory communication." The statement that Jones had been discharged by the Department in October 1990 only concerned appellee's employment status. As Jones asserts in his Reply Brief, the statement "[did] not represent a comment or opinion about [his] performance or conduct as a police officer." Although the statement was factually incorrect, it did not tend to expose Jones to public scorn, hatred, contempt, or ridicule,

"thereby discouraging others in the community from having a good opinion of, or associating with, that person," *Rosenberg*, 328 Md. at 675 (citing *Batson v. Shiflett*, 325 Md. 684, 722-23 (1992)), and cannot be considered a defamatory communication. Because Jones cannot satisfy all of the elements of a defamation claim, a grant of summary judgment in favor of the Department was appropriate.

MISCELLANEOUS CONSIDERATIONS

Although we have disposed of the issues presented to us by the parties in this appeal, we are unable to ignore the question of whether Jones's claims could be satisfied pursuant to the issuance of a writ of mandamus.

A writ of mandamus should not be issued "unless [the party seeking relief] is without other legal remedy, and the duty sought to be enforced is clear and undisputable." *Walter v. Board of County Comm'rs*, 179 Md. 665, 668 (1941); *see also Miller v. City of Baltimore*, 262 Md. 423, 427 (1961) (citations omitted). Consequently, judicial relief by way of mandamus should not be issued against a public officer to adjudicate a question or right that is disputed, *Miller*, 262 Md. at 427, or that could be fully resolved in an ordinary action for damages. *Walter*, 179 Md. at 668-70.

At the time Jones filed his Amended Petition on 2 September 1993, he already had been afforded administrative hearings under Art. 27, § 730 that adjudicated the merits of the felony charges against him, he had been found guilty of those charges in the circuit court and at an administrative hearing, and he had been discharged lawfully from his employment with the Department. Thus, appellee did not have a "clear and undisputable right" to be reinstated that would permit the circuit court to issue a writ of mandamus requiring the Department to reinstate him.

Similarly, the circuit court erred in granting Jones back pay pursuant to a writ of mandamus. As we concluded *supra*, Jones was not entitled to be reinstated during the time period for which he requested back pay and benefits. Consequently, he did not have a "clear and undisputable right" to receive back pay. Even if we were to assume that he has some claim for damages based on the loss of wages, issuing a writ of mandamus to grant such relief still would be inappropriate. The amount of any award of damages is disputable since, before the court may award damages, it must consider whether Jones mitigated his losses. This would require the court to calculate how much Jones actually earned, or could have earned, during the applicable period of time that his suspension without pay continued as a result of an unreasonable delay in affording him a hearing, in order to deduct that amount from any award. *Lemlich v. Board of Trustees*, 282 Md. 495, 505 (1978). Furthermore, Jones's claim in an appropriate action for damages rather than for a writ of mandamus. Although "[a] court shall not refuse to grant a writ of mandamus on the mere ground that the party bringing the action has an adequate remedy in damages," Md. Rule BE46, such a consideration is relevant where additional reasons for not granting the writ are present. *See Miller*, 262 Md. at 427; *Walter*, 179 Md. at 668.

Jones's remaining claims under Count I and Count III for "such other and further relief as the nature of his cause may require," which might encompass any damages that he may have suffered as a result of the alleged violation of his rights under the LEOBR and the United States Constitution, are general prayers for relief and cannot be adjudicated pursuant to a writ of mandamus. *Miller*, 262 Md. at 427 (stating that the relief prayed for under a writ of mandamus cannot be modified according to circumstances). Maryland Rule BE44 does allow a court, "in entering judgment that the writ of mandamus shall issue," to award a plaintiff damages; since we conclude that appellee is not entitled to the issuance of the writ, however, he

is precluded from being awarded damages under that Rule.

JUDGMENT ORDERING THE BALTIMORE CITY POLICE DEPARTMENT AND THE POLICE COMMISSIONER TO PAY BACK WAGES TO ROBERT A. JONES REVERSED.

JUDGMENT IN FAVOR OF THE BALTIMORE CITY POLICE DEPARTMENT AND THE POLICE COMMISSIONER ON COUNT II AFFIRMED.

COSTS TO BE PAID BY APPELLEE/CROSS-APPELLANT, ROBERT A. JONES.

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

ROBERT A. JONES,

Plaintiff,

vs. No. 92275014/CL154693

BALTIMORE CITY POLICE DEPARTMENT, et al.

Defendants.

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Excerpt - Court's Memorandum and Opinion)

Baltimore, Maryland
Monday, February 7, 1994

BEFORE:

THE HONORABLE ELLEN M. HELLER, Associate Judge

APPEARANCES:

For the plaintiff:

MICHAEL MARSHALL, ESQ.

For the defendants:

MICHAEL A. FRY, ESQ.

PROCEEDINGS

(10:35 a.m.)

(Excerpt - Court's Memorandum and Opinion)

MEMORANDUM AND OPINION

FACTS

THE COURT: The facts as presented to this Court, which are not in question and not in dispute, are that on January 12th, 1990 , Officer Jones was charged with two felony counts of criminal activity. On January 18, 1990, he was suspended without pay pursuant to Article 27, Section 734(A)(3). Mr. Jones had joined the Baltimore City Police Department on June 18, 1974.

Both Counsel agree before that suspension without pay occurred, he was brought before someone and asked, "Have you been charged with a felony?" He agreed he had been, and, thus, they suspended him without pay as that State statutory provision permits on its face.

On September 7th, 1990, he was found guilty by a court verdict, of two felonies, and his sentencing was scheduled for December 18, 1990. Prior to the sentencing, however, in view of the court finding or verdict that he was guilty, on October 5, 1990, the Baltimore City Police Department terminated his employment.

In doing so, they relied on the provisions of the Law Enforcement Officer's Bill of Rights contained in Article 27, Section 730(c).

He was, however, informed in a letter dated October 10, 1990, by legal counsel to the defendant that if he received a probation before judgment, a hearing would be scheduled expeditiously.

However, what, in fact, occurred was on December 18, 1990, he was given a probation before judgment under Article 27, Section 641. And, thus, the entry of judgment or the entry of the verdict was struck, and there was no final judgment. As the Court of Appeals found in Jones v. Baltimore City Police Department, 326 Md. 480 (1990), he was not convicted in view of the PBJ and thus was improperly discharged under the provision.

That decision came out in May of 1992. It was not, however, until April 19, 1993, that the Commissioner accepted the recommendation of an Administrative Board and finally terminated Mr. Jones' employment. That was after there had been two administrative hearings, one held December 16, 1992 and the other March 23, 1993.

DISCUSSION

Before the Court today are both parties' motions for summary judgment. The first point is that of back pay. Officer Jones is, in fact, contending today that he is entitled to back pay prior to his termination in April of 1993.

The Baltimore City Police Department states that Mr. Jones was suspended without pay pursuant to Section 734(A)(3) which permits an emergency suspension if charged with a felony, without pay. The Police Department contends, because of the final decision reached in April of 1993, that Mr. Jones was guilty of misconduct because of his finding of guilt in the two felonies, there is no back pay to which he is entitled.

The Court respectfully disagrees. The Court believes that this case is, in fact, governed by the Supreme Court's decision in the Cleveland Board of Education v. Loudermill, 105 Supreme Court, 1487 (1985). The other cite is 470 U.S. 532 (1985).

There is no question in this case that as a Baltimore City Police Department, a public employee, that Officer Jones had a

property right in his job. Thus, under the 14th Amendment he could not be discharged without certain procedural rights and charges. See Section 16-11 of the Code of Public Local Laws of Baltimore City. Specifically 16-8(a) (b) indicates:

> No member of the Police Department may be dismissed or removed except after written charges have been preferred, reasonable notice provided and full opportunity afforded to be heard in the member's own defense.

As Board of Education v. Loudermill states, that before there can be a deprivation of a job there has to be notice and the opportunity for hearing, although it does not always have to be a full adversarial hearing, and that pending that notice and opportunity to be heard an employee must still be paid wages.

In this instance, it is correct that there was an early suspension hearing on January 18, 1990. However, that emergency suspension hearing was because Officer Jones had been charged with felonies. He was not given any opportunity to actually respond to the basis of those charges, but only, both counsel have stipulated and agreed, given the opportunity to agree, in fact, that he had been charged with a felony.

Thus, this was not, as there may be in other cases, the opportunity for him to really explain or be heard on the charges against him. Rather the emergency suspension on the facts of this case were done as an advance of the termination proceedings that the Department was envisioning under the Police Officer's Bill of Rights which would permit a termination without hearing upon the conviction of a felony.

In fact, as it turns out by the Court of Appeals decision, because he was never, convicted; that is, there was never any entry of final judgment because of the PBJ, his original termination in October of 1990 by the defendants was in error. And it was only after he had the full opportunity for a hearing,

as the Court has just summarized, that in April of 1993 he was terminated.

Loudermill indicates that even when there is an emergency situation, for example, "Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job," 105 Supreme Court at 1495, certainly a situation which could be envisioned when a police officer is charged with a felony, "it can avoid the problem of keeping an employee working by," in Loudermill's decision, "suspending with pay."

Thus, the Court interprets the Loudermill majority as saying that when a public employee is suspended, until there is actually an opportunity for some type of hearing on the merits, a public employer must continue paying that employee pay. On the facts of this case, that occurred April of 1993, and, thus, the Court grants judgment on behalf of Officer Jones for back payment from January 18, 1990, until April 19, 1993.

Also before the Court today are defamation charges. In essence, Officer Jones has basically conceded. Thus as to the defamation charges involving the entity known as "CMC" and "ACT," there is no dispute of fact, and the Court is going to grant judgment for the police defendants.

As to CMC, at the time any alleged statements were made, the Department, until it was told otherwise by the Court of Appeals, thought they had terminated the officer. As to the October, 1992, alleged communication to ACT, it is clear by the affidavit of Sergeant Mario DiFonso attached to the Department's memorandum, as well as that of Dr. Jo Ann Bowlsbey that, in fact, there was no defamatory statements made by the Department to ACT, and that even if there were any communications at all, that was not the reason for ACT'S actions as set forth in Dr. Bowlsbey's affidavit.

Thus, the only remaining contest, as Jones himself admits today, deals with the alleged defamatory communications to Lenny's. On this issue the Court, based on

the record before it today, finds a material dispute of fact. On one hand there is the affidavit of Sergeant DiFonso that no communications were ever made to Lenny's Body Shop and Auto Repair Store.

On the other hand, there is also the affidavit attached by Officer Jones of Leonard M. Medicus indicating that he chose not to hire Robert Jones because of a discrepancy between what Mr. Jones told him and telephone communications he had with the Baltimore City Police Department in which apparently he is saying, in Paragraph 4, that the Department claimed that Jones had been discharged in October of 1990.

It must be recalled that these communications are alleged to have taken place in June of 1992 and the Court of Appeals decision would have come down in May of 1992. Thus, in essence, because of the material dispute of fact, the Court is not granting judgment for the City on the communications made to Lenny's body Shop.

Are there any other matters that the Court should address before it today?

MR. MARSHALL: I don't think so, Your Honor.

THE COURT: All right. Then which order should I use?

MR. MARSHALL: Maybe we should prepare one? I don't know.

THE COURT: I think that would be a good idea. Mr. Fry and you could communicate. And do you think you could have an order here by when?

MR. FRY: 2:30.

THE COURT: End of the day is fine. Thank you.

MR. FRY: Very good, Your Honor. Thank you.

MR. MARSHALL: Thank you, Your Honor.

THE COURT: Okay. Thank you both.

(Concluded at 11:48 a.m.)